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RECORD, CASE No. 15,087.

835

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1,117.

GEORGE C. FINNEY ET AL., APPELLANTS,

vs.

F. AUGUST REICH ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED JULY 22, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 9, 1892.

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a In the United States Circuit Court of Appeals for the Seventh Circuit.

GEO. C. FINNEY *et al.*, Appellants,
vs.
F. AUGUST REICH *et al.*, Appellees. } No. 24.

Appeal from the United States district court for the northern district of Illinois.

b In the District Court of the United States for the Northern District of Illinois, Northern Division.

WILLIAM SULLIVAN, JOHN THOMAS, CHARLES BURNS, *et al.*
vs.
PROPELLER J. E. RUMBELL. } No. 24. Admiralty.

Filed Dec. 15, 1891.

OLIVER T. MORTON, *Clerk.*

1 UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss.*:

In the United States District Court for the Northern District of Illinois.

To the Honorable Henry W. Blodgett, judge of said district court:

The libel and petition of F. August Reich and August Reich, copartners and doing business under the firm name of F. A. Reich & Son, residents of the said northern district of the State of Illinois, against the proceeds of sale of the propeller "J. E. Rumbell," her boilers, engines, machinery, boats, tackle, apparel, and furniture, of the port of Chicago, in said northern district of Illinois, and against all persons lawfully intervening for their interest therein in a cause of contract, civil and maritime.

And thereupon the said F. August Reich and August Reich do allege and articulately propound as follows, to wit:

First. That by virtue of certain proceedings instituted by one William Sullivan and heretofore had before said court in admiralty a decree was entered of record on the fourth day of August, A. D. 1891, by which decree the said propeller, "J. E. Rumbell," her boilers, engines, machinery, boats, tackle, apparel, and furniture, were ordered to be sold and the proceeds of such sale to be paid into the registry of this court.

Second. That in pursuance of said decree the said propeller, her boilers, engines, machinery, boats, tackle, apparel, and furniture, was sold on the fifteenth day of August, A. D. 1891, by the marshal of said district to the highest bidder for the sum of eighteen hundred and fifty dollars, and said sum was by said marshal paid into the registry of this court in pursuance of said decree.

Third. That on or about the 23d day of April, A. D. 1891, the libelants, then being the sole owners of said propeller, her boilers, engines, machinery, boats, tackle, apparel, and furniture, sold the same and executed and delivered a bill of sale thereof to one Michael C. Hayes for the purchase price of thirty-five hundred dollars, of which purchase price said Michael C. Hayes paid to the libelants five hundred dollars in cash and made, executed, and delivered to the libelants his six promissory notes for the balance of said purchase price, dated the 23d day of April, A. D. 1891, each of said notes being for the sum of five hundred dollars, payable to the order of the libelants, under the name of F. A. Reich & Son, at their office, in Riverdale, on or before three, nine, fifteen, twenty-one, twenty-seven, and thirty-three months after date respectively, all of said notes bearing interest from date at the rate of seven per cent. per annum, payable semi-annually, true copies of which said notes are hereto attached, marked Exhibits A, B, C, D, E, and F respectively, and made a part hereof.

2 Fourth. That to secure the payment of said promissory notes, principal and interest, and in fulfillment of one of the conditions of said sale the said Michael C. Hayes, then being the sole owner of said propeller, her boilers, engines, machinery, boats, tackle, apparel, and furniture, on or about the said 23d day of April, A. D. 1891, duly made, executed, acknowledged, and delivered to the libelants a certain deed of mortgage, dated the 23d day of April, A. D. 1891, whereby said Michael C. Hayes granted, bargained, sold, and mortgaged to the said libelants, F. August Reich and August Reich, the whole of said propeller, together with the whole of the mast, bowsprit, boat, anchors, cables, chains, rigging, tackle, apparel, furniture, and all other necessaries thereunto appertaining and belonging, which said mortgage was upon said 23d day of April, A. D. 1891, duly filed for record in the collector's office in the district and port of Chicago and recorded in Liber K of Mortgages, folio 65, etc., a copy of which mortgage is hereto annexed, marked "Exhibit G," and made a part hereof.

Fifth. That it was provided, among other things, in and by said mortgage that if default should be made in the payment of any one of said notes, or if said libelants should at any time deem themselves in danger of losing said debt or any part thereof by delaying the collection thereof until the time limited by said notes for the payment thereof, or if said Hayes should suffer or permit said propeller to be run in debt to an amount exceeding in the aggregate the sum of one hundred and fifty dollars, then said libelants were authorized to take possession of said propeller at any time and to sell and convey the same in the manner provided for in said mortgage for the payment and satisfaction of said notes, interest, and expenses of such sale; that one of said notes became due and payable upon the 26th day of July, A. D. 1891, and still remains wholly due and unpaid; that said libelants by reason of the premises deem themselves in danger of losing said debt, and that said Hayes has suffered and permitted said vessel or propeller to be run in debt to an amount greatly exceeding in the aggregate the said

sum of one hundred and fifty dollars, by reason whereof said libelants are entitled to a foreclosure of said mortgage.

Sixth. That said libelants are still the owners and holders of said promissory notes and of each of them; that no part of the principal of said notes or either of them or of the interest thereon or on either of them has ever been paid, and that there is now justly due to said libelants upon said notes and mortgages the sum of three thousand dollars, with interest thereon, at the rate of seven per cent. per annum, from the said 23d day of April, A. D. 1891.

Seventh. That at the time when said mortgage was executed and recorded and at all times since the said propeller has been enrolled at the said port of Chicago, in the district of Chicago, and that the said port of Chicago was on said 23d day of April, A. D.
3 1891, and has ever since been and still is the home port of said propeller and the place of residence of said Michael C. Hayes.

Eighth. That all and singular the premises are true.

Wherefore the libelants humbly pray this honorable court to order and decree that the proceeds of the said sale of said propeller be paid to the libelants, to apply as far as the same will extend toward the payment and satisfaction of the said promissory notes secured by said mortgage upon the said propeller, and for such other and further relief and redress as to right and justice may appertain and as the court is competent to give in the premises.

F. AUGUST REICH.
AUGUST REICH,
By F. A. REICH.

H. W. WOLSELEY AND
I. T. GREENACRE,
Proctors for Libelants.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

F. August Reich, being duly sworn, says that he is one of the libelants whose names are subscribed to the foregoing libel; that he has read said libel and knows the contents thereof, and that the same is true of his own knowledge.

F. AUGUST REICH.

Subscribed and sworn to before me this 21st day of August, 1891.
[SEAL.] HENRY W. WOLSELEY,
Notary Public.

"EXHIBIT A."

$500.00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before three months after date, for value received, I promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riverdale, Ill., with interest, at the rate of 7 per cent. per annum, until paid; interest

payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT B."

$500.00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before nine months after date, for value received, I, ——, promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riv-
4 erdale, Ill., with interest, at the rate of 7 per cent. per annum, until paid; interest payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT C."

$500,00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before fifteen months after date, for value received, I, ——, promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riverdale, Ill., with interest, at the rate of seven per cent. per annum, until paid; interest payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT D."

$500.00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before twenty-one months after date, for value received, I, —— ——, promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riverdale, Ill., with interest, at the rate of 7 per cent. per annum, until paid; interest payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT E."

$500.00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before twenty-seven months after date, for value received, I, —— ——, promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riv-

erdale, Ill., with interest, at the rate of 7 per cent. per annum, until paid; interest payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT F."

$500.00. RIVERDALE, ILL., *April 23rd*, 1891.

On or before thirty-three months after date, for value received, I, —— ——, promise to pay to the order of F. A. Reich & Son the sum of five hundred dollars, at the office of F. A. Reich & Son, Riverdale, Ill., with interest, at the rate of 7 per cent. per annum, until paid; interest payable ½ yearly. This note is secured by a vessel mortgage to F. A. Reich and Aug. Reich, of even date herewith, on the propeller J. E. Rumbell.

No. —.

(Signed) MICHAEL C. HAYES.

"EXHIBIT G."

Upon receipt of this form by the collector, duly executed, the time when received will be at once noted thereon, in its proper place, and will be recorded as soon thereafter as practicable.

(Cat. No. 521.)

From Michael C. Hayes to F. August Reich and August Reich. } Mortgage. Registered or Enrolled Vessels.

To all to whom these presents shall come, Greeting:

Know ye that Michael C. Hayes, of the city of Chicago, in the State of Illinois, and sole owner of the propeller or vessel called the J. E. Rumbell, of the burden of $54\frac{57}{100}$ tons, or thereabouts, of the first part, being justly indebted to F. August Reich and August Reich, of Riverdale, in the State of Illinois, of the second part, in the sum of three thousand dollars, upon his six promissory notes, of even date herewith, each for five hundred dollars, payable to the order of F. A. Reich & Son, at their office in Riverdale, with interest at 7 per cent. per annum on or before three, nine, fifteen, twenty-one, twenty-seven, and thirty-three months after date, interest payable half yearly, has, for the purpose of securing the payment of the said debt and the interest thereon, granted, bargained, sold, and mortgaged, and by these presents does grant, bargain, sell, and mortgage, unto the said parties of the second part, their executors, administrators, and assigns, the whole of said propeller or vessel, together with the whole of the mast, bowsprit, boat, anchors, cables, chains, rigging, tackle, apparel, furniture and all other necessaries thereunto appertaining and belonging.

The certificate of the last enrollment of which said propeller or vessel is in the words and figures following, to wit:

Permanent enrollment No. 112. Official number, enrollment in conformity to Title L (numerals, letters), Statutes of the United States (76419).

F. August Reich, Jr., of Riverdale, Ill. (lumber dealer), having taken and subscribed the oath required by law and having sworn that he owns three-fourths ($\frac{3}{4}$) and August Reich, of Riverdale, owns one-fourth ($\frac{1}{4}$), both citizens of the United States, sole owners of the ship or vessel called the J. E. Rumbell, of Chicago, whereof
6 Bent Swang is at present master, and, as he hath sworn, is a citizen of the United States, and that the said ship or vessel was built at Portage Harbor of Refuge, Mich., in the year 1883, as appears by the certificate of her last enrollment issued at this port May 7th, 1885, No. 61, now surrendered, property changed owners, and said certificate having certified that the said ship or vessel has one deck and one mast, and that her length is 84 feet and $\frac{3}{10}$ feet, her breadth 19 feet and $\frac{3}{10}$ feet, her depth 6 feet and $\frac{3}{10}$ feet, her height — feet and $\frac{}{10}$ feet; that she measures 68 tons and 20-hundredths tons, viz:

	Tons.	100ths.
Capacity under tonnage deck	62	27
Capacity between decks above tonnage deck		
Capacity of inclosures on upper deck, viz	5	93
Gross tonnage	68	20
Deductions under sec. 4153 Rev. Stat's as amended by the act of Aug. 5, 1882	13	63
Net tonnage	54	57

That the following described spaces and no others have been omitted, viz:

That she is a propeller, has a plain head and round stern; and the said —— having agreed to the description and measurement above specified, and sufficient security having been given according to the said title, the said ship or vessel has been duly enrolled at the port of Chicago.

Given under my hand and seal, at the port of Chicago, in the district of Chicago, this 2d day of June, in the year one thousand eight hundred and eighty-seven.

(Signed) T. C. GREENE, [SEAL.]
Deputy Collector of Customs.

—— ——,
Naval Officer.

—— ——,
Commissioner of Navigation.

To have and to hold the said propeller or vessel and all the other before-mentioned appurtenances unto them, the said F. August Reich and August Reich, and to their executors, administrators, and assigns to the sole and only proper use, benefit, and behoof of them, the said F. August Reich and August Reich, and to their executors, administrators, and a-signs forever.

Provided always, and the conditions of these presents is such, that if the said party of the first part, his executors or administrators, shall pay or cause to be paid to the said parties of the second part, their executors, administrators, or assigns, the debt aforesaid, with the interest thereon, at the time or times and in the manner following, to wit:

7 Six certain promissory notes bearing even date herewith, each for the sum of five hundred dollars, payable on or before three, nine, fifteen, twenty-one, twenty-seven, and thirty-three months, respectively, after date thereof, to the order of F. A. Reich & Son, at their office in Riverdale, Ill., together with interest thereon at seven (7) per cent. per annum, interest payable semi-annually—

Then these presents shall be void and of no effect, subject, however, to the provisions hereinafter contained, and the said party of the first part hereby agrees to pay the debt aforesaid and interest thereon, and to fulfill and perform each and every one of the covenants and conditions herein contained.

But if default be made in such payments or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants herein contained, or if the said parties of the second part shall at any time deem themselves in danger of losing said debt or any part thereof by delaying the collection thereof until the expiration of the time above limited for the payment thereof, or if said party of the first part shall sell or attempt to sell said property or any part thereof, or if the same shall be levied upon or taken by virtue of any attachment or execution against said first party, or if said first party shall remove or attempt to remove said vessel beyond the limits of the United States, or if said first party shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of one hundred and fifty dollars, or if said first party shall negligently or willfully permit said property to waste, damage, or destruction, said parties of the second part are hereby authorized to take possession of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, and to sell and convey the same or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, after first giving a notice of ten days, to be given by publication in some newspaper published in Chicago, Illinois, and to retain the same out of the proceeds of such sale, the surplus, if any, to belong and to be returned to said party of the first part.

And it is agreed that on such sale the party of the first part, his executors, administrators, or assigns, may become the purchasers; and the said party of the first part does further covenant and agree

to and with the said parties of the second part, their executors, administrators, and assigns, that he will immediately procure said propelier or vessel to be insured against loss or damage by fire and against all marine risks and disasters in some good and responsible insurance company or companies to be selected and approved by the said parties of the second part for an amount at least equal to the amount which shall from time to time remain unpaid upon the said indebtedness and interest thereon, and that he will keep such policy or policies renewed from time to time and keep the same valid at all times for the amount aforesaid; that he will do, suffer, or permit to be done no act whereby said insurance would be liable to be vitiated or forfeited, and that he will immediately assign and deliver to said second parties said policy or policies of insurance, having first duly obtained the proper consent of the insurance company or companies to such assignment, and that he will also promptly deliver to said second parties the renewal certificates of said policies as a collateral security for the payment of said indebtedness; and if said first party shall fail to immediately procure, assign, and deliver such policy or policies as aforesaid, or shall at any time fail to immediately renew the same and deliver the renewal certificates as aforesaid, the said parties of the second part, their executors, administrators, or assigns, are hereby authorized to procure said propeller or vessel to be insured as aforesaid, and to keep the policy or policies renewed, and the amount which they have to pay therefor shall be considered and is hereby declared to be an additional indebtedness hereby intended to be secured and shall be repaid to said parties of the second part, their executors, administrators, or assigns, on demand and shall bear interest at ten per cent. from the time of such payment until repaid.

And it is hereby provided that it shall be lawful for said first party, his executors and administrators, to retain possession of the property hereby mortgaged, and at his own expense to use and enjoy the same until said indebtedness shall become due, unless said second parties should at any earlier date declare this mortgage forfeited for non-performance of any of the covenants herein contained or by virtue of any authority hereby conferred on said second party.

In testimony whereof I, the said Michael C. Hayes, have hereunto set my hand and seal this 23d day of April, in the year one thousand eight hundred and ninety-one.

Signed, sealed, and delivered in presence of—

(Signed) MICHAEL C. HAYES. [SEAL.]

STATE OF ILLINOIS, } ss:
Cook County, }

I, Charles W. Greenfield, a notary public in and for the county of Cook, State of Illinois, do hereby certify that Michael C. Hayes, personally known to me as the same person whose name is subscribed to the annexed instrument of writing, appeared before me this day in person and acknowledged that he signed, sealed, and

delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

(Signed) CHARLES W. GREENFIELD,
Notary Public.

9 [NOTARY PUBLIC. L. S.] Given under my hand and notarial seal this 23d day of April, A. D. 1891.

——— ———,
Notary Public.

(Endorsed:) Collector's office, district of Chicago, port of Chicago. Received for record on the 23d day of April, A. D. 1891, at 3.30 o'clock p. m., and recorded in Liber K of Mortgages, folio 65, etc. (Signed) A. W. Hall, dep. collector.

(Endorsed:) Filed Aug. 21, 1891. Wm. H. Bradley, clerk.

10 (Endorsed:) Filed Sept. 16, A. D. 1891. Wm. H. Bradley, clerk. Schuyler & Kremer, proctors for petitioner.

To the Honorable Henry W. Blodgett, judge of the district court of the United States for the northern district of Illinois:

The joint petition of George C. Finney and James Channon, Henry P. Finney, doing business under the firm name of Finney & Channon; Robert E. Hills, Robert Tarrant, George C. Campbell, B. Christoffer, John Hayes, Michael T. Coughlin, T. B. Banner, Thomas Bagley, the Richardson Fueling Company, the Chicago Dry Dock Company, the Hallett Iron Works, the Independent Coal Company, Michael Leyden and James Doyle, doing business under the firm name of Leyden & Doyle; Joseph M. Gillespie and John G. Moore, doing business under the firm name of Gillespie & Moore, and Patrick Bowe, John Oliver, Jr., W. G. Oliver, constituting the firm of Oliver Bros., all of the city of Chicago, State of Illinois, respectfully shows that, in pursuance of a writ of *venditioni exponas* issued from the district court of the United States, the propeller "J. E. Rumbell," of Chicago, her engines, boiler, boat, tackle, apparel, and furniture, was sold on the 15th day of August, 1891, for the sum of $1,850, which said sum has been paid into the registry of this court.

2d. That there is due to the petitioners the firm of Finney & Channon the sum of $179.09 for ship-chandlery supplies furnished to said vessel, at the request of the master thereof, on and between the 24th day of April and the 3d day of July, 1891.

3d. That there is due to the petitioner Robert R. Hills the sum of $67.14 for engineers' supplies furnished to said vessel, at the request of the master thereof, on and between July 21, 1887, and June 26, 1891.

4th. That there is due to the petitioner Robert Tarrant the sum of $106.43 for engineers' supplies furnished to said vessel, at the request of the master thereof, on and between May 19, 18—, and July 1, 18—.

5th. That there is due to the petitioner George C. Campbell the

sum of $18.19 for groceries furnished said vessel, at the request of the master thereof, on the 25th day of June, 1891.

6th. That there is due to the petitioner B. Christoffel the sum of $8.49 for meat furnished said vessel, at the request of the master thereof, on the 5th day of June, 1891.

7th. That there is due to the petitioner Michael T. Coughlin the sum of $8.80 for engineers' supplies furnished to said vessel,
11 at the request of the master thereof, on and between August 29, 1889, and June 25, 1891.

8th. That there is due to petitioner T. B. Banner the sum of $62.36 for boiler and engine supplies furnished to said vessel, at the request of the master thereof, on and between May 8, 1891, and June 9, 1891.

9th. That there is due to petitioner Thomas Bagley the sum of $44 for supplies furnished to said vessel, at the request of the master thereof, on May 5, 1891.

10th. That there is due to the Richardson Fueling Company the sum of $183 for coal furnished to said vessel as fuel, at the request of her master, on and between May 6th and July 5, 1891.

11th. That there is due to petitioner The Chicago Dry Dock Company the sum of $209.74 for repairs to said vessel, at the request of the master thereof, on and between the 6th and 16th days of June, 1891.

12th. That there is due to petitioner The Hallett Iron Works the sum of $35.82 for engine supplies furnished to said vessel, at the request of the master thereof, on and between the 2d and 10th days of June, 1891.

13th. That there is due to petitioner The Independent Coal Company the sum of $28.80 for coal furnished said vessel, at the request of the master thereof, on and between the 12th and 18th days of July, 1891.

14th. That there is due to petitioners Leyden & Doyle the sum of $51.84 for groceries furnished to said vessel, at the request of the master thereof, on and between the 24th day of June, 1891, and the 3d day of July, 1891.

15th. That there is due to petitioners Gillespie & More the sum of $62.58 for groceries furnished to said vessel, at the request of the master thereof, on and between April 28, 1891, and June 2, 1891.

16th. That there is due to petitioners Oliver Bros. the sum of $12.28 for lumber furnished to said vessel, at the request of the master thereof, on the 30th day of May, 1891.

17th. That there is due to Patrick Bowe the sum of $220 for services rendered on board of the said vessel as the master thereof, at the request of the owners of said vessel, and for which said Bowe, under the laws of the State of Illinois, has a lien.

18th. That the said supplies furnished to and work and labor done on said vessel were so furnished and done, at the request of the master thereof, at Chicago, and were reasonable and proper to be furnished and done, and that the same amount in the aggregate to the sum of $1,328.56, no part of which has ever been paid, although

frequent demand therefor has been made by the several petitioners. True and itemized accounts of said supplies, repairs, and services are hereto attached and made a part of this petition.

19th. That all and singular the premises are true.

12 Wherefore petitioners pray that the court would be pleased to pronounce for their respective demands and decree the same to be paid out of the proceeds of the said vessel, and for such other and further relief and redress as in law and justice they may be entitled to receive.

GEORGE C. FINNEY.
JAMES CHANNON,
HARRY P. FINNEY,
By GEORGE C. FINNEY.

SCHUYLER & KREMER,
Proctors for Petitioners.

On this 15th day of September, 1891, before me personally appeared George C. Finney, one of the above-named petitioners, and was sworn to the truth of the foregoing petition.

[SEAL.] CHARLES E. KREMER,
Notary Public.

* * * * * * *

13 Afterward, to wit, on the thirteenth day of October, in the adjourned October term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

GEORGE C. FINNEY
vs.
PROCEEDS THE PROPELLER J. E. RUMBELL. } Admiralty.

Upon motion of libelant, by his proctor, the court, having heard the proofs, finds that there is due the libelant from the respondent the sum of thirteen hundred and twenty-eight dollars fifty-six cents.

It is thereupon considered and adjudged by the court that the libelant have and recover of and from the respondent the sum of thirteen hundred twenty-eight dollars and fifty-six cents, his damages so as aforesaid found, together with his costs herein, to be taxed.

On the same day, to wit, on the thirteenth day of October, in the adjourned October term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

F. AUGUST REICH
vs.
PROCEEDS PROPELLER J. E. RUMBELL. } Admiralty.

Upon motion of the libelant, by his proctor, for decree, the
14 court, having heard the proofs, finds that there is due the libelant from the respondent the sum of thirty-one hundred and forty dollars.

It is thereupon considered and adjudged by the court that the libelant have and recover of and from the respondent the sum of thirty-one hundred and forty dollars, his damages so as aforesaid found, together with his costs herein, to be taxed.

On the same day, to wit, on the thirteenth day of October, in the adjourned October term of said court, 1891, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, judge, is the following entry, to wit:

Order.

WILLIAM SULLIVAN *et al.*
vs.
THE PROPELLER J. E. RUMBELL. } Admiralty.

Now come the parties interested in the proceeds of the sale of said propeller, now in the registry of this court, by their respective proctors, and move the court for the distribution of said proceeds; and it appearing to the court that the claims filed against said propeller or the proceeds of the sale thereof, and for which decrees have been entered, amount to forty-nine hundred and twenty-one dollars and twenty-five cents; that the taxed costs thereon amount to three hundred and twenty-two dollars and fifty-two cents, and that said proceeds amount to eighteen hundred and fifty dollars, and the court, being now fully advised in the premises, orders:

First. That the costs, except in the case of George C. Finney *et al.*, be paid in full.

Second. That the decrees for wages be paid in full.

Third. That the decree for towage be paid in full.

Fourth. That the decree for salvage be paid in full.

Fifth. That the decree upon the mortgage be paid in full.

Sixth. That the balance, if any, be paid on the decree for home supplies, as follows:

That the decrees in favor of William Sullivan *et al.* for two hundered and eighteen dollars for wages, in favor of Henry A. Root *et al.* for one hundred dollars for salvage, in favor of the Vessel Owners' Towing Company for sixteen dollars for towing, in favor of S. J. Clerk *et al.* for eighty-eight dollars and ninety-four cents for wages, and in favor of John Hayes for twenty-nine dollars and seventy-five cents for wages, amounting in all to four hundred and fifty-

two dollars and sixty-nine cents, be paid in full, and that a check therefor be drawn upon the registry to the order of Schuyler
15 & Kremer, their proctors, including eighty dollars, the docket fee therein.

That the clerk's fees herein, amounting to sixty-one dollars and five cents, be paid to the clerk, and that a check for fifty-one dollars, being a part thereof, be drawn upon the registry to the order of William H. Bradley, clerk.

That the marshal's fees, amounting to one hundred and thirty dollars and sixty-seven cents, be paid to the marshal, and that a check therefor be drawn upon the registry to the order of Frank Hitchcock, marshal.

That the clerk's fees of ten dollars and five cents and the docket fee of seventy dollars in the case of F. August Reich *et al.* against said proceeds be retained for the further order of the court; that the balance of said proceeds, amounting to eleven hundred and five dollars and fifty-nine cents, be paid upon said decree on the mortgage in favor of F. August Reich *et al.*, and that a check therefor, including the docket fee therein of twenty dollars, be drawn upon the registry to the order of H. W. Wolseley, their proctor.

And thereupon George C. Finney *et al.*, who have heretofore filed their petition in this court against said proceeds of the sale of said propeller for supplies furnished by them to said propeller in the home port, and who have recovered a decree therefor in the sum of thirteen hundred and twenty-eight dollars and fifty-six cents and costs of suit, appear by Schuyler & Kremer, their proctors, and object to the payment out of said proceeds of said decree upon the mortgage in favor of F. August Reich *et al.*, and, after hearing the counsel, the court, being now fully advised, rules that said decree upon the mortgage in favor of said F. August Reich *et al.* should have priority over said decree in favor of George C. Finney *et al.* for supplies furnished in the home port.

And thereupon said petitioners, George C. Finney *et al.*, by their said proctors, now except to said ruling of the court and pray an appeal to the United States circuit court of appeals for the seventh judicial circuit, which is allowed upon their filing a bond in the penal sum of five hundred dollars, with surety to be approved by the court.

16 Circuit Court of Appeals for the Seventh Circuit.

GEORGE C. FINNEY *et al.*, Appellants,
vs.
F. AUGUST REICH, Appellee.

It appears from the record in this case that on the 15th day of August, 1891, the propeller "J. E. Rumbell" was sold by the marshal under a writ of *venditioni exponas* issued from the district court of the United States for the northern district of Illinois, in admiralty, for the sum of $1,850.00. On the 21st day of August the appellee, F. August Reich, filed his petition against the proceeds of

said vessel in the registry of the court, claiming the sum of $3,000 and interest due upon notes executed by one Michael C. Hayes, the owner of said propeller "J. E. Rumbell," for a part of the purchase-money of said propeller and secured by a mortgage upon
17 the whole of said vessel, which said mortgage was dated the 23rd day of April, 1891, and on the same day was duly recorded in the office of the collector of customs for the port of Chicago, that being the place where the owner resided and the home port of the vessel.

On the 16th day of September, 1891, appellants, George C. Finney and others, filed their petitions against the proceeds of the "Rumbell" to recover the sum of $1,328.56, due to the petitioner and to sixteen other persons and firms for ship-chandlers' supplies, engineer supplies, groceries, provisions, fuel, repairs, and for lumber bought for and furnished the vessel subsequent to the recording of said mortgage, at the port of Chicago (the place from which the vessel hailed), and used for the benefit of the vessel, and the home port of said vessel, and also for the services of one Patrick Bowe, rendered subsequent to the recording of said mortgage, as master of said vessel, for which supplies, repairs, and services there was a lien upon the said vessel under the laws of the State of Illinois.

18 Decrees were entered on both of the petitions, and the district court, in ordering the distribution of the proceeds, preferred the claim of F. August Reich, appellee and mortgagee, to those of George C. Finney and others, appellants, and the entire proceeds of the sale of said vessel, after the payment of the claims for seamen's wages and other preferred claims amounting to $1,105.59, were ordered to be paid to the appellee on his claim as mortgagee.

The appellants appealed to this court from the decree of the district court, and one of the questions now before this court and which arose upon the hearing of this appeal is as to whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequent to the date of the recording of the mortgage, and this question is now certified to the Supreme Court of the United States for instructions as to what the proper decision of this court should be.

19 It is further ordered by the court that the petitions filed in and the orders entered by the district court and contained in the record in the above cause be made a part of this certificate.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United State circuit court of appeals for the seventh circuit, do hereby certify that the foregoing twenty pages, numbered from one to twenty, inclusive, contain a true copy of the record in the case of Geo. C. Finney *et al. v.* F. August Reich *et al.*, together with the order certifying said cause to the

U. S. Supreme Court as the same remains upon the files and records of said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 13th day of July, A. D. 1892.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Case No. 15,087. United States circuit court of appeals, seventh circuit. Term No. 1117. George C. Finney *et al.*, appellants, *vs.* F. August Reich *et al.* Filed July 22, 1892.

148 U.S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

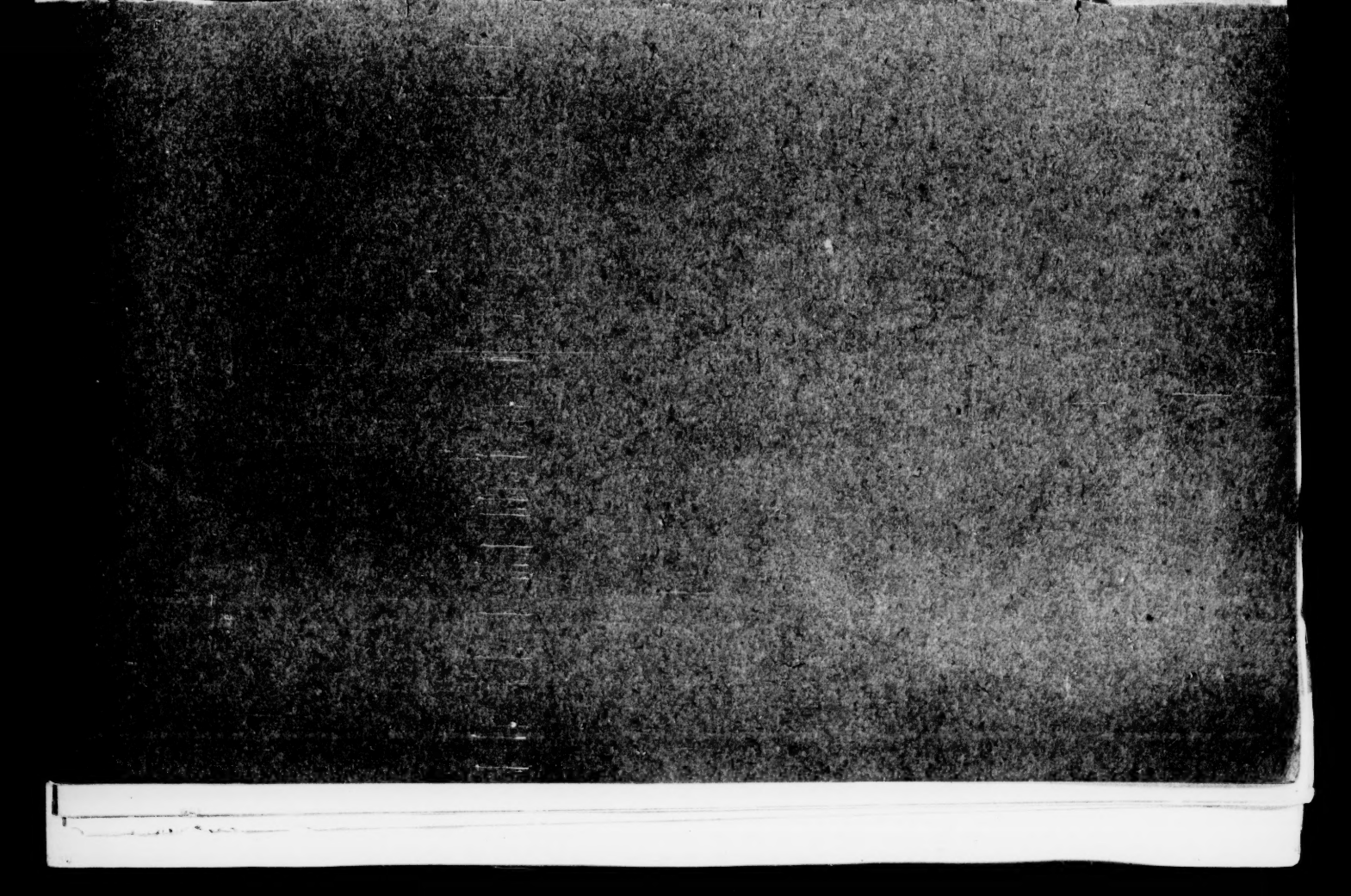
THE PROPELLER J. E. RUMBELL,
GEORGE C. FINNEY ET AL.,
Appellants,

vs.

F. AUGUST REICH,
Appellee.

BRIEF OF C. E. KREMER,

PROCTOR FOR APPELLANTS.



IN THE

Supreme Court of the United States.

THE PROPELLER J. E. RUMBELL,
GEORGE C. FINNEY ET AL.,
Appellants,

vs.

F. AUGUST REICH,
Appellee.

BRIEF OF C. E. KREMER,

PROCTOR FOR APPELLANTS.

This case is certified to this court by the judges of the Circuit Court of Appeals for the Seventh Circuit. The certificate is as follows:

It appears from the record in this case that, on the 15th day of August, 1891, the propeller "J. E. Rumbell" was sold by the marshal, under a writ of *venditioni exponas*, issued from the District Court of the United States for the Northern District of Illinois in Admiralty, for the sum of $1,850. On the 21st day of August, the appellee, F. August Reich filed his petition against the proceeds of said vessel, in the registry of the Court, claiming the sum of $3,000 and interest due upon notes ex-

ecuted by one Michael C. Hayes, the owner of said propeller "J. E. Rumbell," for a part of the purchase money of said propeller, and secured by a mortgage upon the whole of said vessel, which said mortgage was dated the 23d day of April, 1891, and on the same day was duly recorded in the office of the Collector of Customs, for the port of Chicago, that being the place where the owner resided and the home port of the vessel.

On the 16th day of September, 1891, appellants, George C. Finney and others filed their petitions against the proceeds of the "Rumbell" to recover the sum of $1,328.56, due to the petitioner and to sixteen other persons and firms, for ship-chandlers' supplies, engineer supplies, groceries, provisions, fuel, repairs, and for lumber bought for and furnished the vessel, subsequent to the recording of said mortgage, at the port of Chicago (the place from which the vessel hailed) and used for the benefit of the vessel, and also for the services of one Patrick Bowe, rendered subsequent to the recording of said mortgage, as master of said vessel, for which supplies, repairs and services there was a lien upon the said vessel under the laws of the State of Illinois.

Decrees were entered on both of the petitions, and the District Court, in ordering the distribution of the proceeds, preferred the claim of F. August Reich, appellee and mortgagee, to those of George C. Finney and others, appellants, and the entire proceeds of the sale of said vessel, after the payment of the claims for seamen's wages and other preferred claims, amounting to $1,105.59, were ordered to be paid to the appellee on his claim as mortgagee.

The appellants appealed to this court from the decree of the District Court, and one of the questions now before this court, and which arises upon the hearing of this appeal, is as to whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a

vessel in its home port, in the State of Illinois, subsequent to the date of the recording of the mortgage, and this question is now certified to the Supreme Court of the United States for instructions as to what the proper decision of this court should be.

It is further ordered by the court that the petitions filed in, and the orders entered by the District Court and contained in the record, in the above cause, be made a part of this certificate.

I.

THE MORTGAGE.

A vessel mortgage is a lien which derives its force not from the maritime law, but from the contract of the parties, and depends for its efficacy on the principles of the common law. It is, therefore, subject, like all other common law liens, to all other prior and higher liens, whether they be for supplies, material, bottomry bonds or liens under the State law. As soon as the mortgage is executed, the mortgagee is ordinarily entitled to the possession of the ship.

If he leaves her in the possession and control of the mortgagor and allows her to go into commission and to be employed, he thereby consents that her master or the mortgagor is permitted to contract for such supplies and repairs, and for such labor as may be necessary and proper for the vessel in the commerce in which she is engaged; and for such supplies and repairs a lien is given, either by the maritime law or the law of the State where the supplies are furnished or the repairs made.

For the purpose of subjecting the vessel to subsequent liens, the mortgagor is deemed to act with the consent and authority of the mortgagee, and, to the extent that the vessel is bettered

by the supplies and repairs, he, as well as the mortgagee, is directly benefited. The mortgagee is benefited because of the means thereby furnished to the mortgagor with which to liquidate the indebtedness due the mortgagee. Hence it is that the lien of the mortgagee should be postponed to the subsequent liens incurred and arising out of the employment of the vessel, whether they consist of liens for salvage, seamens' wages, or necessary supplies and materials, collisions or other maritime torts or contracts, whether the same exist by virtue of the maritime law or the laws of the different States.

Congress has recognized the vessel mortgage by the passage of the Registry Act of 1850, and this act provides:

Sec. 4,192: "No bill of sale, mortgage, hypothecation, or "conveyance of any vessel, or part of any vessel, of the United "States, shall be valid against any person other than the "grantor or mortgagor, his heirs and devisees, and persons "having actual notice thereof, unless such bill of sale, mort- "gage, hypothecation or conveyance is recorded in the office "of the collector of the customs where such vessel is registered "or enrolled. The lien by bottomry on any vessel, created "during her voyage by a loan of money or materials neces- "sary to repair or enable her to prosecute a voyage, shall not, "however, lose its priority, or be in any way affected by the "provisions of this section."

This is simply, so far as it refers to a mortgage, a registry act. The act does not attempt to establish priorities as be-between other liens and mortgages. The mortgage contract is not made maritime by this act of Congress; it is not enlarged or in any way made more sacred.

In the case of *Bogart et al.* v. *the Steamboat* "*John Jay*," 17 How., 399, at page 401, the court says:

"It has been repeatedly decided in the admiralty and com- "mon law courts in England that the former have no jurisdic-

"tion in questions of property between a mortgagor and the "owner. No such jurisdiction has ever been exercised in the "United States. No case can be found in either country "where it has been done. In the case of the Neptune, 3 Hagg. "Admiralty Reports, 132, Sir John Nicholl, in giving his judg- "ment, observes: 'Now upon questions of mortgage, the "court of admiralty has no jurisdiction; whether a mortgage "is foreclosed; whether a mortgagee has a right to take pos- "session of a chattel personal; whether he is the legal or "equitable owner, and whether a right of redemption means "that a mortgagee is restrained from selling in repayment of "his debt till after the time specified for the redemption is "passed; the decision of these questions belongs to other "courts; they are not within the jurisdiction or province of "the courts of admiralty, which never decides on questions of "property between the mortgagee and tne owner.' "

"This is not so because such a jurisdiction has been denied "by the jealousy of the courts of common law. Its foundation "is that the mere mortgage of a ship, other than that of an "hypothecated bottomry, is a contract without any of the "characteristics or attendants or a maritime loan, and is en- "tered into by the parties to it without reference to navigation "or perils of the sea. It is a security to make the perform- "ance of the mortgagor's undertaking more certain; and, "whilst he continues in possession of the ship, disconnecting "the mortgagee from all agency and interest in the employ- "ment and navigation of her, and from all responsibility for "contracts made on her account. Such a mortgage has "nothing in it analogous to those contracts which are the sub- "jects of admiralty jurisdiction. In such a case, the ship is the "object for the accomplishment of the contract, without any "reference to the use of her for such a purpose. There can "not be, then, anything maritime in it. A failure to perform "such a contract cannot make it maritime. A debt secured

"by the mortgage of a ship does not give the ownership of it "to the mortgagee."

Therefore, in this case, the appellee could not have filed a libel against the Rumbell to enforce the payment of his mortgage, or to enforce his possession of the vessel or to obtain a decree and an order of sale of the vessel. His only standing in court is by petition against the proceeds of the vessel in the registry, and this standing he has solely by virtue of the conveyance and title given him by the owner, who, could himself, have intervened and obtained the remnants of the proceeds of the vessel not exhausted by the lienholders.

The mortgagee is in court solely because of the authority delegated to him by the owner of the vessel, not by virtue of any inherent right as mortgagee, obtained by reason of the lien created either by the contract or the act of Congress. Having no standing, therefore, in a court of admiralty, we claim that the mortgagee has no rights as against any lienholders whose liens are founded upon a maritime contract, and who are therefore legitimately in a court of admiralty by virtue of the maritime law.

The Lien for Supplies.

The contract for furnishing supplies and materials to an enrolled and licensed vessel of the United States engaged in interstate commerce is a maritime contract.

Beginning with the case of the "Gen. Smith," 4 Wheat., 438, and followed by the case of *Peroux* v. *Howard*, 7 Pet., 324, and down to the decision of the case of the "Lottawanna," 21 Wall., 558, the Supreme Court have held that the contract for furnishing supplies and materials to a vessel in the home port is a maritime contract, and if a lien therefor be granted by the laws of the State, the same can be enforced by proceeding *in rem* in the District Court.

On page 609 of the last case the court says: "It seems to "be settled in our jurisprudence that so long as Congress does "not interpose to regulate the subject, the right of material-"men in furnishing necessaries to a vessel in her home port "may be regulated in each State by such legislation. State "laws, it is true, can not exclude the contract for furnishing "such necessaries from the domain of admiralty jurisdiction, "for it is a maritime contract and they can not alter the limits "of that jurisdiction, nor can they confer it upon said courts "so as to enable them to proceed *in rem* for the enforcement "of the liens created by such State laws, for it is exclusively "conferred upon the District Courts of the United States. * "* * But the District Court of the United States having "jurisdiction of the contract as a maritime one, may enforce "liens given for its security even when created by state laws."

The law of the State of Illinois, which grants to the appellants a lien for the supplies and materials, for which they claim in their petition, is as follows:

CHAPTER 12.

Sec. 1. "Be it enacted by the people of the State of Illinois, represented in the General Assembly, that every sail vessel, steamboat, steam-dredge, tug-boat, scow, canal-boat, barge, lighter, and other water craft of above five tons burthen, used or intended to be used in navigating the waters or canals of this State, or used in navigating the waters or canals of this state, or used in trade and commerce between ports and places within this State, or having their home port in this State, shall be subject to a lien thereon, which lien shall extend to the tackle, apparel and furniture of such craft, as follows:

First. For all debts contracted by the owner or part owner, master, clerk, steward, agent, or ship's husband of such craft, on account of supplies and provisions furnished for the use of such water craft, on account of work done or services rendered

on board of such craft by any seaman, master or other employee thereof, or on account of work done or materials furnished by mechanics, tradesmen, or others in or about building, repairing, fitting, furnishing or equipping such craft."

This is the particular provision of the statutory law which gives to these petitioners a lien upon the propeller.

The appellants contend therefore:

I.

That the contract for supplies furnished a vessel in the State where her owner resides, being maritime, and a lien therefor being granted by the laws of the State, of which both contracting parties are residents, is entitled to equal rank with the claims for supplies furnished to the vessel while in other States by persons residing there.

We are unable to find any valid or sound reason why there should be a distinction. It was the *dicta* of Judge Story, in the case of the *Gen. Smith*, which first laid the foundation for the numerous decisions which fostered the erroneous idea that there should be a distinction made.

American jurists and the judges of the Supreme Court, in the numerous cases in which the question of the limits of the admiralty jurisdiction is discussed, notably the case of the Genesee Chief, 12 How, 443, assert that the maritime law as adopted and practiced in England, at the time of the adoption of the Constitution, is not binding upon the courts here, and that it is the maritime laws of the different Nations which must be considered in arriving at what should be the maritime law of the United States.

The Lottawanna, 21 Wall., 558.

If this be true, and we find that by the maritime codes of the European Nations, liens for supplies furnished the vessel in the home port are granted in all of them, except England, it is dif-

ficult to understand why the distinction should be made in this country. It is manifestly unjust, and the injustice is so glaring that it must appear to every one. For example: St. Joseph, Michigan, is a foreign port to Michigan City, Indiana, twenty-five miles away, while Marquette, Michigan, by lake 500 miles distant, is not foreign.

The civil law, the general maritime law and the particular codes, without exception, extend this lien or privilege to all ships and vessels, without any distinction between foreign and domestic ships.

Ben. Ad., Sec. 272 S. C., and cases there cited.

If there be no lien for supplies furnished in the home port, by virtue of the general maritime law of the United States, it does not follow that the lien given by the State law should be outranked by the one given by the maritime law. Both are maritime contracts and made to supply the same necessity, and both are liens upon the vessel. A court of admiralty will enforce one as readily as the other, and in so doing, is governed by identical rules of practice. If the States have a right to legislate on the subject, and this is conceded by the Supreme Court, why is not their legislation entitled to as much respect as the national law? As between home and foreign supplies there is no conflict except as to priority to a fund in the registry. Both parties have decrees of equal dignity and force, granted by the same court, with no statutory enactment by Congress favoring either. Why should one be preferred to the other?

Judge Dyer in 1875, in the case of *Whittaker* v. *Schooner J. A. Travis*, (7 Chicago Leg. News, 275), held that, under the twelfth rule in Admiralty, as amended in 1872, persons furnishing supplies in the home port were entitled to a lien of equal dignity with that given for foreign supplies, and were therefor entitled to preference over the claims of a mortgagee.

In the Sixth Circuit, Judge Baxter, in the case of the Burn-

side, 3 Fed. Rep., 228, has placed these liens upon an equal footing.

Judge Brown, of Detroit, in delivering the opinion of the District court in the same case, says: "I am informed, too, "that the practice of clerks in many Eastern districts, in the "distribution of proceedings, is to place domestic and foreign "materialmen in the same rank."

Judge Baxter was one of the first to dissent from the opinion of many of the Federal, District and Circuit judges, who were simply following the mischievous *dicta* of Judge Story in the Gen. Smith case. He says, on page 235: "The courts of "the United States have made some innovations in order to "adapt the admiralty laws to the exigencies of our situation to "inland navigation, and if there were decisions of the United "States upon this question, I should, of course, adhere to them, "and so administer the law; but, as there are none, though "there are conflicting cases in the minor courts, * * * yet "they are decisions reached by subordinate tribunals, reason-"ing from analogy, and I do not know that they have gone so "far as to be obligatory upon other judges. In this particular "case, however, I hold that I am at liberty to look to and decide "upon first principles, considering the question an open one. "In administering the law upon this question, I have de-"termined to mete out equal justice to every one, and to rec-"ognize the claims which the laws of the State give to par-"ties."

In a subsequent case, that of the Guiding Star, 9 Fed Rep., 521, Judge Swing, of Cincinnati, also places both liens in the same category.

This case was appealed and heard by Judge Baxter and Justice Mathews. An opinion was written by the latter, which will be found in the 18th Fed. Rep., 263, and in this he freely concurs in the opinion of the District Judge, and both liens are treated as having equal rights to the funds in the registry.

In the case of the canal boat Dan Brown, 9 Ben., 309, Judge Benedict says: "I am unable to see any substantial "difference in character between a lien upon a vessel arising "out of the maritime contract, and given by the maritime "law, and a lien arising out of a maritime contract, given by "the law of the State."

The decision of Judge Baxter is most important, as it establishes the rule in an adjoining circuit. Many home supplymen of this and other ports in the 7th circuit have, in the past, when the opportunity was offered, filed their libels in the courts of the 6th circuit, notably in the Western District of Michigan, and in that way obtained the benefit of the rulings enforced there.

In the late case of the Madrid, 40 Fed. Rep., 677, Mr. Justice Lamar says: "There would seem to be no reason, on "principle, why the lien created by the local statute should "not rank with the lien given by the general maritime law. "They each have, as a basis, the furnishing of necessary "supplies to the ship, upon the credit of the ship itself. In "each instance the contract is maritime. The proceedings by "which the lien, in each instance, is enforced are identical. "And the same reason which makes the lien given by the "general maritime law takes precedence over ordinary "mortgage debts, and other claims not maritime, is applicable "in the case of liens given by the local law."

It has always been the rule of the Seventh Circuit to prefer the claims of foreign materialmen not alone as against mortgagees, but also against the claims for home supplies. This was done because of the rule laid down in the case of the *Gen. Smith*, in which case it was held that there was a lien under the maritime law for foreign supplies.

Appellants now ask, not that the lien of the mortgagee be lowered, but that the lien of the home supplymen be raised to the

rank of the claim for foreign supplies. Both are maritime contracts, and the law of the state is as much binding upon the citizens and the courts as the Constitution of the United States, and entitled to as much respect.

There is no conflict between the different laws. The maritime law, as adopted in this country, must be considered now as adopting so much of the State law as grants a lien. It has been frequently held that, under the maritime law, there is no lien for home supplies, unless a lien be given by the State law of the State where the supplies are furnished. When this occurs, the maritime or admiralty court will at once assume jurisdiction and as firmly enforce the lien as when it is established by a solemn Act of Congress.

There is nothing in the supplies that makes them less worthy, valuable or necessary in the one case than in the other; they may be the same identical material, but furnished in different States, and the places where they are furnished may be as they would be if the vessel was in the Menomenee river, with Menominee, Michigan, on one side, and Marinette, Wisconsin, on the other, or in the St. Louis river with Duluth, Minnesota, on one side and Superior, Wisconsin, on the opposite sides of a river, one as accessible as the other.

In the light of these localities the distinction made by the courts seems ridiculous.

A vessel from Illinois might, while in the Calumet river, at Hammond, Indiana, buy crackers there, while the cheese for the voyage might be purchased ten miles down the river at Chicago, in Illinois. In that case, the crackers would be secured by a maritime lien, while the cheese is only sustained by a statute of the State of Illinois and, therefore, outranked by the claim for the crackers and a claim under a mortgage.

It would be extremely difficult to convince the seamen who ate both crackers and cheese, and found them equally good,

that one was not entitled to as great an interest in the ship as the other.

Both liens should stand side by side in the same rank, and should together be either preferred or deferred to a mortgage.

In all of the states bordering upon the great lakes, except those within this circuit, the claims for home supplies are preferred to mortgages.

Above all things, the rule should be uniform. Lord Ellenborough, in *Rex* v. *Eccleston*, 2 East., 303, says that it "is "often of more importance to have the rule settled than to de-"termine what it is."

The rule now in force was established in the cases of the "Grace Greenwood" and "Skylark," decided by Judge Drummond, the first in 1869, and the last in 1870. The decision in these cases was subsequently followed by him in the case of *The Kate Hinchman*, 7 Biss., 366, decided in 1875, With one exception, the case of the "Grace Greenwood" was the first case in which the question of priority between a mortgage and home supplies was decided. Since this case, however, we find numerous decisions.

The earliest case we find is that of *Reeder* v. *Steamship George's Creek*, 3 Am. Law Reg., 236.

This case was decided by Judge Giles, at Baltimore, in 1854, and before him it was urged that the Registry Act gave the mortgagee privileges which entitled him to priority over the claims of the materialmen. The court, however, took a different view of the question, and preferred the materialmen's claims.

In 1876, Judge Hughes, of Virginia, decided the case of *The Steamer Raleigh*, 2 Hughes, 44; on page 54 of the opinion, he says:

"The claims of materialmen are held by the maritime law

"in equal favor with the wages of seamen; repairs and sup-
"plies being no less essential than the services of mariners to
"furnish 'wings and legs' to the ship, to enable her to com-
"plete her voyage for the benefit of all concerned. In fact,
"the mortgagee simply takes the place and stands in the shoes
"of the owner as to the materialmen, which the maritime
"law makes good against the owner of an unincumbered ship,
"are good against the mortgagee of the ship incumbered by
"recorded deed. *There is certainly nothing in the act of*
"*Congress providing for the registration of these mortgage*
"*deeds which gives them a superiority over maritime liens.*"

The Prop. W. T. Graves, 8 Ben., 568, was decided by Judge Wallace in 1879.

Upon the hearing the court's attention was called to the cases of the "Grace Greenwood," "Skylark" and "Lady Franklin."

This case was appealed and was decided by Judge Johnson, in 1877, who affirmed the decree of the District Court. (14 Blatch. 194.) After quoting the language of the act of 1850, the court on page 195, says: "The obvious purpose of this "proviso was to make it entirely clear that a bottomry bond "did not come within the statute requiring certain instruments "to be recorded. It might otherwise have been contended "that it was in some sense an hypothecation of the vessel, and, "therefore, required to be recorded. It will be observed that "the proviso is confined to liens by bottomry. If this proviso "be construed to mean that such a lien only is out of the pur-"view of the statute, and that all other liens are postponed to "that of a mortgagee, then the claims of salvors and all those "having other strictly maritime liens would be thus postponed, "to the subversion of the whole principle on which efficacy is "given to such claims, and the overthrow of the best settled "and most salutary principles of the maritime law. Indeed,

"any principle upon which this statute can not be expounded "to give such a priority to a recorded mortgage, would also "extend to bills of sale and other conveyances recorded under "the same law, and thus practically overthrow the whole "scheme of maritime law upon the subject of maritime liens. "This statute I conclude, therefore, has no relation to the "question involved; and the lien of the libelant is left to stand "upon the statute of New York, which the courts of the "United States do enforce in the courts of admiralty."

In the case of *The Island City*, 1 Low., 375, Judge Lowell preferred the claim of the materialman furnishing supplies to the mortgage. This case was decided in 1869.

In the same year Judge Withey, of Michigan, in the case of *The St. Joseph*, Brown's Ad., 202 S. C., allowed the claims of the materialmen to be paid before that of the mortgagee.

The same judge in the year 1877, in the case of the tug *Alice Getty*, 9 Legal News, 315, followed the ruling in the case of the St. Joseph, and after referring to the cases of the *Grace Greenwood* and *Kate Hinckman*, 2 and 6 Biss., says:

"Now, nothing is better settled than that a mortgage on a "vessel creates no maritime claim; on the contrary, the mort- "gage represents an ordinary debt, to which are attached no "maritime rights whatever, and can no more be enforced in "admiralty courts than can a judgment or execution lien in "favor of a creditor, who has, through proceedings in a State "court levied on the vessel. The mortgage gives a lien, so "does the levy; but neither can operate to deprive maritime "claims, for which the local or maritime law gives a lien, of "superior rank and claim to priority, and this rests upon that "measure of public policy in favor of those who supply ves- "sels with necessary things, to enable them to proceed on "their voyage, without which marine commerce could hardly "be sustained, and because the supplies are supposed to be to "the advantage of both owners and creditors of the vessel.

"*The only standing a mortgagee can obtain in a proceed-*
"*ing in admiralty is against the remnant in registry, and*
"*this only by petition under the 43d admiralty rule.* We
"understand the Lattawanna case to have settled nothing on
"the question whether a mortgage lien outranks a lien for
"supplies given by the local law. In that case it was held
"that liens asserted under the laws of Louisiana had never
"been perfected, and, therefore, had no standing before the
"court. This left the mortgagee at liberty, under the 43d
"admiralty rule, to come forward and claim what was left of
"the remnant in the registry of the court as against the owner
"of the boat. We regard that case as supporting, in very
"many points, what we have here said. If a mortgagee
"wishes to avoid claims arising against the mortgaged vessel,
"he should take possession and avoid debts, but if he lets her
"sail, he understands the necessity that may arise for supplies
"and repairs on the credit of the ship, and he can no more
"defeat those debts by asserting his mortgage than could a
"purchaser. He is benefited by any repairs, and may be by
"ordinary supplies, which enable the ship to proceed on her
"voyage, and thus save her freights."

In 1878 Judge Hoffman, of California, in the case of *The Hiawatha*, 5 Sawy., 160, gave the materialmen the priority.

In the case of *The Favorite*, 3 Sawyer, 409, it was held:
"There is nothing in the language of section 4,192, Revised
"Statutes, that indicates an intention to enlarge the operation
"of a mortgage on a vessel, or place the lien of it in any
"better condition with reference to other liens than it was be-
"fore."

In the case of *The Canada*, 7 Fed. Rep., 730, on page 735, Judge Deady, of Oregon, after quoting the foregoing language, says:

"And this is more evident when we consider that the ob-

"ject of the statute was not to advance or prefer mortgages, "but to protect the public against them by requiring them to "be registered in an appropriate and convenient place. * * * "But apart from the provisions of the New York statute, "preferring the lien of the materialman to that of the mort- "gage, I think it clear, upon general principles of law and "right, that it is entitled to such preference. A mortgagor "in possession represents the mortgagee, and in contracting "debts for necessaries is, therefore, authorized to bind his in- "terest in the vessel for their payment, so far as the law gives "a lien therefor. In this respect there is an implied agency "between them. Necessaries supplied the vessel through the "agency of the mortgagor, promote the interest of the mort- "gagee, as well as the mortgagor either by enabling the lat- "ter to navigate her, and thus earn money to pay the indebt- "edness due the former, or to preserve her value as a security "therefor."

On the hearing of the above case all of the decisions upon this question *pro* and *con* were offered to the court, including the cases of the "Grace Greenwood" and "Kate Hinchman," and the comments of the court upon these are as follows: "The cases cited from Bissell, Abbott and Woods appear to "have been decided upon the assumption that the lien or opera- "tion of the mortgage in some way was created by or de- "rived from the act of Congress, and, therefore, is superior "to that of the materialman. * * * So far, then, as I "am able to discern, there is nothing in the language or pur- "pose of the act of Congress, from which it can be inferred "that it was the intention to prefer the lien of the mortgagee "to that of a materialman, or any other."

In 1880, Judge Brown (E. D., of Michigan), in the case of the *City of Tawas*, 3 Fed. Rep., 170, places claims for material furnished in the home port, and for which a lien is given by the State law, in a class above that of mortgages.

Judge Baxter, in the same year, decided the case of the *Gen. Burnside, supra.*

In the year 1881, Judge Swing, of Ohio, followed the ruling of Judge Baxter, in the case of *The Guiding Star*, 9 Fed. Rep., 521.

In the case of *The Josephine Spangler*, 9 Fed. Rep., 773, Judge Hill, of Mississippi, holds that claims for supplies in the home port, if accruing prior in point of time, must be preferred to a mortgage.

The most remarkable case is that of *The De Smet*, 10 Fed. Rep., 483, decided by Judge Pardee, of the Fifth Circuit. In this case he reviews at great length and very learnedly section 4,192 U. S. Statutes, and comments upon the decisions of Judge Woods in the cases of *The John T. Moore*, 3 Woods, 61, and on page 486, says: "And there is another "consideration. If the said section 4,192 gives a lien to re- "corded mortgages, recorded according to its provisions, does "it not give a lien, if not an absolute title, to conveyances re- "corded according to its provisions? And, under it, can not "a devisee, by a duly recorded conveyance, deny all supplies "and materials furnished the boat in a home port, and in that "way defeate the State lien entirely?

"As to the admiralty rules of the Supreme Court, which "control proceedings in admiralty, referred to, it is true they "affect remedies, and not rights. Yet, under the twelfth rule "as it existed prior to 1859, and as it now is, a lien under the "local law for materials and supplies may be enforced in ad- "miralty by proceedings *in rem.* Is it possible that, after "such a lien is enforced, a mortgage creditor, who has no "standing in court but for remnants, can step in and receive "all the proceeds? And if the act of Congress gives a lien to "a mortgage recorded according to its provisions, what is the "rank of that lien? Who can say that it is not a better lien "than subsequent admitted maritime liens?

"It seems that the theory of a lien being given by section "4,192 to a recorded mortgage is destructive of all principles "in regard to liens, whether maritime or domestic. Liens are "founded on necessity, 'to give credit to the ship,' 'furnish "wings and legs,' and 'because ships are built to plow the "seas, and not to rot at wharves.'"

"The foregoing considerations, and the arguments present-"ed in the many cases bearing on this question that I have "examined, drive me to the conclusion that the said section "4,192 S. C., in relation to the recordation of conveyances and "mortgages on ships, *gives no lien or other priority to mort-"gages and conveyances than they had before the act was passed*, "except to recorded conveyances and mortgages, and convey-"ances not recorded in certain cases. It affects mortgages "and conveyances on ships, as the various registry acts of the "States affect conveyances and mortgages of land and chattels; "as a registration law affects the rights of voters. In other "words, it gives no new rights; it preserves rights already "acquired. It is a law that requires owners and mortgagees "of ships to advertise their claims; to give notice (construct-"ive) to all the world of their demands; but in a conflict of "rights the owner must stand on his conveyance; the mort-"gagee on his mortgage. *And as, prior to the recording law, "liens, whether maritime or domestic, under the maritime law "or under the State law, had priority over mortgage, so now "they have priority.* These being my views of the law appli-"cable, my duty in the premises, as to the proper judgment to "render in this case, would seem plain."

It seems remarkable that, with these views, Judge Pardee should have permitted the rule to stand as established by Judge Woods.

Judge Pardee, in the case of DeSmet, adhered to the rule established by Judge Woods, upon the ground of *stare decisis*.

And it will doubtless be claimed that this rule should be invoked here.

Mr. Justice Lamar, in the case of The Madrid, 40 Fed. Rep., 677, after reviewing all of the authorities including the DeSmet case on page 678, says upon the point:

"Counsel for mortgagees rely mainly upon the doctrine of "*stare decisis* to support the claim of their clients. Their con- "tention is, that the rule of law heretofore announced in this "circuit should stand, because, as they assert, rights of property "have been acquired under it, and vested rights will be dis- "turbed by any change. On the other hand, it is strenuously "insisted by counsel for the materialmen that the decisions of "this circuit upon the general question under consideration are "erroneous, and should not be followed. It is claimed that the "lien given by the State statutes for supplies, etc., furnished a "domestic vessel, stands on an equality with those liens arising "under the general maritime law for supplies, etc., furnished a "foreign vessel.

"The rule of *stare decisis* means, in general, that when a point "has been once settled by judicial decision it forms a precedent "for the guidance of courts in similar cases. It expressed 'the "principle upon which rests the authority of judicial decisions "as precedents in subsequent litigations.' Ab. Law Dict., 497; "*Gee's Adm'r.* v. *Williamson*, 27 Amer. Dec., 631, note. "This rule should, in the main, be strictly adhered to. An "adherence to it is necessary to preserve the certainty, the "stability and the symmetry of our jurisprudence. Neverthe- "less, there are occasions when a departure from it is rendered "necessary in order to vindicate plain and obvious principles "of law and to remedy a continued injustice. There are two "grounds of justification in departing from a decision which "has become a precedent. Wells, Res. Adj., Sec. 598.

"The decisions of the Circuit Courts of the United States

"not being uniform upon the general question at issue in this "case, it can hardly be said that any of them has become a "rule of property, within the principle of the doctrine of *stare* "*decisis*. The learned justice who preceded me upon this cir- "cuit, were he alive and holding court here, could certainly "exercise the right to change his mind upon the question, and "make his opinion accord with that of some of the other courts "of equal authority, which, in the light of later discussions, "have adopted a different view. Nothing short of a convic- "tion which would induce him to do so could constrain me to "depart from a ruling made by a predecessor whose high char- "acter as a jurist receives from me a deference fully equal in "force to that which the principle of *stare decisis* exacts. I act "the more readily upon the conclusion reached by me, after a "careful examination of the adjudged cases, because of the "vital importance of uniformity in the administration of ad- "miralty law by the courts of the United States, which uni- "formity can itself be permanently assured only by settling the "rule on correct principles of law."

The rule of *stare decisis* has no application here because the rulings of the courts in the adjoining and other circuits bordering upon the lakes have always maintained a different rule than the one in force on this circuit.

Vessel owners and supplymen, whenever it could be done, sought to file their libels in the courts of the other circuits; and realizing that this could be done, no rights of property were or could be fixed by any decision in any of the circuits bordering on the lakes so long as the courts of all were open to suitors, and the vessels could be easily reached with process when in any of them. There was therefore no such stability of the law, as the people could rely upon, and in view of which their contracts were made. *No rights were settled or fixed because the law was not uniform.*

For instance, a vessel owned in Chicago, is mortgaged to

a citizen of the same place; a supplyman at Chicago furnishes her supplies, and a libel is filed against her for the supplies in the western district of Michigan, while she is in that jurisdiction. She is sold under these proceedings, and her proceeds are distributed. In this distribution under the practice in that circuit, the claims for supplies would be preferred to the mortgage. Just such a contingency, every person taking a vessel mortgage was compelled to consider, no matter what the rule in the home port of the vessel might be.

The *lex fori* and not the *lex loci contractus* governs in cases of the distribution of the proceeds of a vessel.

The Union, Lush, 128.
The Selah, 4 Sawy., 40.

The practice and rule in this matter is now uniform in all the circuits of this country, and the home supplies are preferred to mortgages in all of them, with the exception of the seventh.

This question has been decided in the different circuits in the following cases:

1st Circuit—Judge Lowell, Circuit Judge:
The Island City, 1 Low., 375.

2d Circuit—Judge Johnson, Circuit Judge:
Wm. T. Graves, 14 Black., 198; affirming 8 Bev., 568.
J. W. Tucker, 20 Fed. Rep., 129.
Arctic, 22 Fed. Rep., 126.
Amos D. Carver, 35 Fed. Rep., 665.

3d Circuit—Acheson, District Judge:
The Venture, 26 Fed. Rep., 285.

4th Circuit—Seymour, District Judge, sitting in the Circuit Court:
Clyde v. *Transp. Co.*, 36 Fed. Rep., 501.

5th Circuit—Mr. Justice Lamar:

The Madrid, 40 Fed. Rep., 677.

6th Circuit—Mr. Justice Matthews:

The Guiding Star, 18 Fed. Rep,, 263.

The General Burnside, 3 Fed. Rep., 228.

The Rapid Transit, 11 id., 322.

8th Circuit—Thayer, District Judge:

The Wyoming, 35 Fed. Rep., 548.

Shiras, District Judge:

The Menominee, 36 Fed. Rep., 197.

9th Circuit—Hoffman, District Judge:

Francis v. *The Harrison*, 1 Sawy., 353.

The Hiawatha, 5 Sawy., 160.

Deady, District Judge:

The Canada, 7 Fed. Rep., 730.

Is there any reasonable ground left for continuing to enforce this rule, opposed as it is to the rule in every other part of the United States?

Respectfully submitted.

C. E. KREMER,

Proctor for Appellants.

July, 1892.

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IN THE

SUPREME COURT OF THE UNITED STATES.

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Appellants,
vs.
F. AUGUST REICH ET AL.,
Appellees.

1119

Brief of Appellees.

CHARLES E POPE,
Proctor for Appellees.

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BRIEF OF APPELLEES.

This case is certified to this court by the judges of the Circuit Court of Appeals for the Seventh Circuit. The certificate is set forth in the brief filed by the appellants, and therefore need not be here repeated.

The only question which arises under the certificate is, whether a claim arising upon a vessel mortgage is to be preferred to a claim for supplies and necessaries furnished to a vessel in its home port, in the State of Illinois, subsequent to the date of the recording of the mortgage.

Judge Blodgett, of the District Court for the Northern District of Illinois, held in this case that the claim under the mortgage should be preferred to that for supplies. In support of that decision, I submit the following:

I.

The appellants had no lien under the general maritime law, nor are the contracts under which they furnished the supplies maritime contracts.

It has been repeatedly held by the United States Supreme Court, the Supreme Court of Illinois and other tribunals, that material-men, furnishing repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel by the general maritime law as received in the United States.

The Lottawanna, 21 Wallace, 558.
Tug Boat E. P. Dore v. *Waldron*, 62 Ill. 221.
The Mary Bell, 1 Sawy. 135.
The Lady Spangler, 9 Fed. Rep. 775.
The Marcelia Ann, 34 Fed. Rep. 143.
The Madrid, 40 Fed. Rep. 679.

The reasons why a maritime lien is given for supplies furnished in a foreign port, are obvious. To promote commerce and enable vessels in a foreign port to procure without delay needed supplies, there is a necessity for the pledging of the credit of the vessel. Vessel owners usually have no credit in a foreign port, and the delay which would result if material-men in a foreign port had to inquire into the credit of the owner residing in the home port, or as to whether any mortgage was there recorded, would cause great delay and loss to commerce. To make such inquiries in the home port, by material-men residing there, would cause no loss or delay, but would, on the contrary, save in many cases very great loss.

As Justice Lamar, in the case of *The Madrid*, 40 Fed. Rep. 679–680, says: "No lien is given by the general maritime "law to material-men for supplies furnished a vessel in her "home port, because, in that case, according to the general "accepted theory, the presumption is, that credit is given "to the owner."

From 1859 to 1872, the Supreme Court of the United States by its rules gave the right to persons furnishing supplies to a vessel in her home port, to proceed in admiralty only *in personam but not in rem*. In 1872, the rule was changed to the present twelfth rule. Speaking of this change the Supreme Court, in the case of *The Lottawanna*, 21 Wal-

lace, on page 579, say: "It was simply intended to remove "all obstructions and embarrassments in the way of institut- "ing proceedings *in rem* in all cases where liens exist by "law, and not to create any new lien, which, of course, this "court could not do in any event, since a lien is a right of "property, and not a mere matter of procedure."

And in the case of *The Madrid*, 40 Fed. Rep. 680, Justice Lamar there said: "Of course this modification of the rule "can not avail where no lien exists; but where one does "exist, no matter by what law, it removes all obstacles to a "proceeding *in rem, if credit is given to the vessel.*"

There is no allegation in the petition filed by the appellants, nor any proof in the record that any of the supplies, repairs or services furnished by any of the appellants, were furnished on the credit of the vessel, or that they were necessary.

The general maritime law not only required that the contract be made in a foreign port, but a lien did not attach unless the supplies were necessary and could not have been obtained upon the personal credit of the owner.

The Grapeshot, 9 Wallace, 129.
Pratt v. *Reed*, 19 How. 359.
The Lady Franklin, 1 Bissell, 559.

In *Williamson* v. *Hogan*, 46 Ill. 517, the Supreme Court of Illinois said: "We have found no authority for saying "that supplies furnished a steamboat in her home port, "under a contract with the proper party, is in its nature "and of necessity maritime."

Appellants contend that the simple fact that their supplies, etc., were "furnished to said vessel at the request of the master thereof" (Abst. 22, 23), makes a maritime contract. This the appellees deny and insist that nothing is alleged by appellants, or shown in the record, to entitle the several contracts under which the latter claim, to be fairly called maritime contracts.

Williamson v. *Hogan*, 46 Ill. 517, and cases there cited. In the case of *The Rapid Transit*, 11 Fed. Rep. 332, it is said:

" It seems to me a fair implication that whenever a State " attaches a lien to a maritime contract to be enforced in the " admiralty, that whatever would operate under the mari- " time law of that court to waive, forfeit or postpone a lien " of like character, whether considered in its relation to " liens of another grade or in its relation to other liens in " the same grade, should have the same effect on the lien " created by the State, and that it is intended that the strict " letter of the statute should be so construed. Desty, Adm. " §§ 82–89; 21 Am. Law Reg. (N. S.) 147; *A New Brig*, " Gilp. 473; *The Hornet*, Crabbe, 426; *The Indiana*, Crabbe, " 479; *The T. P. Leathers*, 1 Newb. 432; *The Katie*, 3 Woods, " 182."

II.

The appellants have no lien other than the one given by the Illinois Statute of 1874, and such lien is subject to the prior mortgage of appellees.

In the petition filed by the appellants, no lien of any kind is mentioned or claimed, except that in the seventeenth article (Abst. 23) it is stated that Patrick Bowe, one of the appellants, has a lien for wages as master under the laws of the State of Illinois.

Being a statutory and not a maritime lien, the question of its effect and extent depends, in a very great measure, upon the statute creating it. The statutes of the various States differ materially, as I shall hereafter show, in their several requirements necessary to create a lien, and also in the extent and effect of the lien created.

These different requirements of the various statutes have been recognized by the Supreme Court of the United States in the case of *The Lottawanna*, 21 Wall. 558, where the requirement of the Louisiana statute for the recording of a lien not having been complied with, it was held that no lien was obtained. And in the case of *The Edith*, 94 U. S. 520, it was held that the rights of the parties under the New York statute were governed and limited by the provisions of that statute.

Also in the case of *The Marcelia Ann*, 34 Fed. Rep. 143, Judge Bond held that as the Maryland statute provided that the lien given should not entitle a claimant to a preference over a prior mortgage, such lien gave no priority beyond that which the plain language of the statute implied.

Therefore each particular case should be only considered in connection with the particular statute which gave the lien involved in the case.

In 1869, Judge Drummond, in deciding the *Grace Greenwood* case, 2 Bissell, 134, said that under the Illinois Statutes such a mortgage as that of appellees would be "a valid and "binding security upon the property, and one which the "claims of material men, under the State law, can not su- "persede or override, and that the mortgage took prece- "dence over supplies in the home port."

Judge Drummond again decided the same question in the same way in the case of *The Skylark*, 2 Bissell, 251, and said: "I wish it distinctly understood that I shall not hold, un- "less told to do so by the Supreme Court of the United "States, that every claim which a State Legislature may "declare to be a lien against a vessel, shall override a mort- "gage properly recorded under the law of Congress."

In the case of *The Kate Hinchman*, Judge Blodgett, in the District Court, decided the same way. On appeal to the Circuit Court, Judge Drummond affirmed the decree of the District Court, and said, that although a lien existing only by the State law could be enforced in admiralty, "it by no means follows that because a law of the State gave a lien, that it is superior to a mortgage. * * * It seems to me, as between these different liens existing in this case, that of the mortgage is paramount."

The Kate Hinchman, 7 Bissell, 238.

Since the first decision of Judge Drummond in 1869, the question has been decided repeatedly in the Seventh Circuit in the same way, in spite of the numerous times when the proctors, for negligent material men, have endeavored to obtain the adoption of a contrary decision.

Appeals have been taken from the District Court and argued four times, in the Circuit Court of the Seventh Circuit, on one occasion before Justice Harlan, but the judges hearing such appeals have invariably refused to reverse the former decisions.

Upon two occasions the question has been passed upon by the Supreme Court of Illinois, and decided in the same way. In the case of *Great West No. 2*, v. *Oberndorf*, 57 Ill. 168, the court held that the lien of the material-men upon vessels for supplies furnished in the home port was inferior to that of a prior mortgage. This decision was followed by that of the *Propeller Hilton* v. *Thomas E. Miller et al.*, 62 Ill. 230, in which the court says, "That a prior mortgage "of a vessel has precedence of the lien of a material-man "subsequently acquired, is settled by the case of the "*Barque Great West No. 2* v. *Oberndorf*, 57 Ill. 168."

The Illinois law at the time of these decisions was construed in the case last mentioned, 57 Ill. 168, to create a lien on the vessel, which is all that the present statute of 1874 does by Sec. 1, Chap. 12, Rev. Stats., 1874, cited in the brief of appellants.

In the case of *The Josephine Spangler*, 9 Fed. Rep. 775, Judge Hill, of the Southern District of Mississippi, held, that "Materials and supplies furnished at the home port are only "liens, by force of the State's statutes, and therefore do not "stand on the same footing with maritime liens, so that "their priority depends upon whether they attach before or "after the mortgage lien commenced. This position is sustained by Judge Drummond (*The Grace Greenwood*, 2 Biss. 131), which was followed by Judge Blodgett in the case of *The Kate Hinchman*, 6 Biss. 367, and again by Judge Woods in the case of *The John T. Moore*, 3 Woods, 61." This is still the rule, I believe, in Mississippi and Maryland.

The Marcellus Ann, 34 Fed. Rep. 143.

In *Scott's Case*, 1 Abbott, U. S. 336, Judge Sherman, of the Northern District of Ohio, on page 342, said: "By virtue "of the mortgage, the mortgagees acquired a lien on the

"vessels to the amount named in them, and by the record-"ing of them they gave notice to the world, including "these claimants, that such a lien existed. The mortgages "are no more a maritime lien than these domestic claims "are. The mortgages and claims are of equal validity, and "both were a charge and lien upon the propeller, to be "paid according to their priority of date."

This was a case in bankruptcy against the proceeds of sale of a vessel sold in the admiralty court, but the judge says, page 338: "Strictly maritime liens, such as seamen's "wages, materials, supplies and repairs in ports of other "States, for damages for collision, and for towage and wharf-"age in foreign ports. There was no question as to the "validity and priority of these liens, and under former "orders of the court they have been paid."

Until the decision of the case of *The Madcid*, already cited, and decided in 1889, the rule in Louisiana was the same as in this circuit, as to the priority of a mortgage over home supplies. But in Louisiana the statute giving the lien to a material-man is essentially different from that of Illinois.

The lien given by the Illinois statute is a secret one, existing for the period of nine months without requiring any notice to be given of it to any person, or the filing or recording of any such notice. The statute of Louisiana on the contrary, by Sec. 3274 of its code, provides that such lien shall have no preference over third persons, unless it has been recorded in the parish where the vessel is, *on the day when the contract was entered into*. In the case of *The Lottawanna*, already cited, this recording was held essential to obtaining any lien.

The statutes of many other States also require as a condition to the maintenance of a lien in similar cases, the filing or recording of a notice of the lien.

In North Carolina, by § 1805 of its statutes, notice of the lien has to be filed in the same manner as notices of other statutory liens are.

In Massachusetts, by § 15, Chap. 192, Pub. Stats., the lien

is conditioned upon the filing of a sworn statement of the claim with the clerk of the city or town where the vessel was, within four days after the vessel departs from port.

In South Carolina, by § 2390 of its statutes, a similar statement has to be filed with the clerk of the Court of Common Pleas within the same time.

In Maryland also, by Sec. 45 of Art. 63 of its laws, a statement of the claim must be filed under oath with the clerk of the Circuit Court.

In New York, by Sections 2, 3, Vol. 3, p. 2712, Rev. Stats. (Birdseye's Ed.), specifications of any such claim must be filed in the office of the clerk of the county in which the debts were contracted, and in the office of the auditor of the canal department, within thirty days after the debt was contracted.

If such notice had been required in Illinois, the appellees could have early discovered that the conditions of the mortgage were being broken, and could have taken steps to foreclose their mortgage as soon as an amount of indebtedness exceeding $150 for home supplies had been contracted, for the mortgage provided that if the mortgagor "shall suffer or permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of one hundred and fifty dollars," then the mortgagees could take possession, etc. (Abst. 14, 19.)

In Pennsylvania the lien continues only between the contracting of such debts and the time when the vessel proceeds on her next voyage.

Pa. Stats. (Brightly, 1883) 124, § 2.

Under the present law of Illinois, whilst the appellants had record notice of the existence of the mortgage, and had or could have had actual notice of it by walking to the Custom House, the appellees had no way, in such a city as Chicago, to ascertain what, if any, supplies were furnished to the vessel and were unpaid for. So that between April 23d, when the mortgage was recorded (Abst. 14, 21) up to July 15th, when the vessel was seized by the marshal (Abst.

8), not three months, we find secret liens to the amount of $1,328.56, in addition to $452.69 for wages, towage, etc. (Abst. 36), claimed under that law, which if preferred to the mortgage would strike the ordinary mind as being most unjust and inequitable.

If the equity of the case should govern its decision, then the rights of the appellants, furnishing these supplies with knowledge of the existence of the mortgage, should be subordinated to the prior rights of the appellees holding the mortgage, and having no means of ascertaining the secret subsequent liens of the appellants.

2 Parsons' Ship. & Adm., 344–345.

It is a general rule of law and equity that where one of two innocent persons must suffer loss, that one should suffer by whose negligence the loss occurred. Applying the rule to this case, there is no negligence shown on the part of the appellees, whilst the appellants, having notice of the mortgage and recklessly furnishing the vessel with supplies, were certainly guilty of negligence.

The proctor for appellants cites the case of *The Charlotte Vanderbilt*, 19 Fed. Rep. 219, where Judge Brown says that in providing, as the mortgage did, that the mortgagor might use the vessel for the purposes of navigation, the mortgagee "necessarily assented, by implication, to the creation of "maritime charges and liens on the vessel." But that case is not in point, as it was for supplies furnished in a foreign port. There are no "maritime charges or liens" in this case, and the statute of New York is essentially different from that of Illinois.

Upon the 22d and 23d pages of the brief for appellants, sixteen cases are quoted as holding that the reason for the rule in force in this circuit is an erroneous one. Upon an examination of these cases we find that among them are decisions of only two circuit judges and two circuit justices, the rest being decisions of district judges. We also find that in these sixteen cases, seven of them do not directly refer

to a mortgage, but are upon questions arising upon foreign and domestic liens. Those cases are the ones cited in:

The J. W. Tucker, 20 Fed. Rep. 129;
The Arctic, 22 Fed. Rep. 126;
The Amos D. Carver, 35 Fed. Rep. 665;
The General Burnside, 3 Fed. Rep. 228;
The Rapid Transit, 11 Fed. Rep. 322;
The Wyoming, 35 Fed. Rep. 548;
The Menominee, 36 Fed. Rep. 197.

The case of the *Wm. T. Graves*, 14 Blatch. 194, was a case *where credit was given to the vessel*, which therefore can not be considered as a parallel case to the one now in question. The other decisions quoted in the second circuit and the cases cited as decided in the eighth circuit do not refer directly to a mortgage.

The argument of the proctor for appellants is largely based upon an appeal for a uniformity of decisions among the different circuits. From his own argument, it appears that in other places the rules as to the priority of other liens are different in the different circuits. The cases cited by him show that in Michigan, Kentucky, Missouri and Minnesota the liens for home supplies given by statutes of those States, are placed upon an equal footing with those of foreign supplies under the maritime law.

In the seventh circuit and in most, if not all, of the others, a contrary rule is held, so that the reversal of the rule in this circuit as to the priority of a mortgage over home supplies would not cause a perfect unanimity on the question of liens among the several circuits.

The decisions cited in the brief of the appellants, which may be considered as deciding the question in other States, cover only eight States: those of Massachusetts, New York (when credit is given to the vessel), Pennsylvania, North Carolina, Ohio, Louisiana, California and Oregon; in all of which States the statute creating the lien is essentialiy different from that of Illinois, with perhaps the exception of Ohio.

The proctor for appellants shuts his eyes to the fact that the liens given in the various States to material-men are given by widely different statutes; and that, whilst it might be neither unfair nor inequitable under such statutes as that of Louisiana, which requires a speedy public notice to be given of such liens, to prefer the latter to a mortgage, yet it would be manifestly unfair and inequitable to do so under the law of the State of Illinois, which requires no such notice.

The holder of the secret lien, given by the Illinois law, has nine months before he need do anything to give notice of it or enforce it, a length of time more than double the time given to any other such lien.

On this subject the United States Supreme Court said: "It may be added that the existence of secret liens is not in "accord with the spirit of our commercial usages, and a "uniform law by which the liens in question should be re- "quired within a reasonable time to be placed on record in "the custom house, like mortgages, and otherwise properly "regulated, would be of great advantage to the business "community."

The Lottawanna, 21 Wallace, 581.

Admiralty law does not favor secret liens, contracts or agreements; then no favor should be given to such a secret lien as the appellants can alone claim.

The Cumberland, 30 Fed. Rep. 451.
Pratt v. *Reed*, 19 How. 359.

"To allow vessels to be subject to secret maritime liens "to those furnishing her with her usual supplies on her "regular trips, and at her usual ports of entry and discharge "upon such trips, would be injurious to the best interests "of commerce. If this were permitted, the interests of the "parties having mortgages upon vessels, and of owners "letting vessels upon charters, would be greatly jeopar- "dized, and the vessel practically could be run at their "cost."

Drummond, J., *The Lady Franklin*, 1 Bissell, 560.

Not only do the various State statutes differ in regard to the giving of notice of the lien claim, but they also differ materially in the effect and scope of the lien.

In Maryland the lien by Art. 67, Sec. 48, Maryland Code, is not entitled to priority over a prior mortgage or bill of sale.

In Vermont the lien by Sec. 1981, Rev. Laws, 1880, has "precedence of all other claims and liens."

In Pennsylvania, the lien by Sec. 1, 1 Penn. Stats. (Brightly), 124, is to be "in preference to any other debt due from the owners" of the vessel.

In New York the lien by Sec. 2, 3 Rev. Stats. (Birdseye), "2712, shall be preferred to all other liens thereon, except "mariner's wages."

The Canada, 7 Fed. Rep. 735.

In Massachusetts by Sec. 15, Chap. 192, Pub. Stats., 1882, the lien is "preferred to all others on such vessel except "that for mariner's wages." And so also in South Carolina by Sec. 2389, Genl. Stats., 1882.

The Island City, 1 Lowell, 375.

In Missouri, by § 771, Rev. Stats., 1889, such "liens shall "have precedence of all other liens and claims against such "boat or vessel."

In Kentucky the statute of 1852, gave "the local lien preference over all other liens of like character, for work done out of the State (Kentucky), thus preferring them to maritime liens for supplies."

The Rapid Transit, 11 Fed. Rep. 332.

In Oregon, by § 3691, Hill's Annotated Laws, the liens given "have precedence over all other liens and claims against such boat or vessel."

In California, by § 813, Deering's Stats., the lien has preference over all other demands.

The Harrison, 1 Sawy. 353.

The statute of Illinois simply gives "a lien," as I have before stated, so that no decision can be properly considered

as contrary to the decisions in Illinois unless it appears that it was rendered upon a State statute in all respects similar to that of Illinois, giving a simple secret lien.

In 1872 the same question was presented to the House of Lords for decision, on appeal from the High Court of Admiralty, in the case of *The Two Ellens*, Law Rep., 4 Pr. Council App. 161. In an interesting opinion Lord Justice Mellish then said, p. 166: "There have been several cases in the Court of Admiralty on this point, and the decisions are to a certain extent conflicting. * * * The question has to be determined by their lordships, and it may be said, perhaps, that as far as authority is concerned, the authorities are very equally balanced." After a full discussion of the English cases the court decided in favor of the priority of the mortgage over claims for repairs and supplies.

In 1884 the question was again presented to the House of Lords, and decided in the same way in the case of *The Rio Tinto*, Law Rep. 9, H. of L. and P. C. 356, so that the law of England as settled by the court of last resort is now that the claim of the mortgagee is superior to that of the domestic lien holder.

III.

By the repeated decisions in the seventh circuit, the priority of a prior mortgage over home supplies has become established, as the lex fori, and such priority is a right of property.

Whether one lien is entitled to priority over another depends upon the *lex fori*.

The Union, Lush, 128.
The Selah, 4 Sawy. 40.

The priority of liens in admiralty is according to that given by the *lex fori*, and is regulated by that law exclusively.

Henry, Adm. Jur. and Proc., § 43.
Graf Klot Trautvetter, 8 Fed. Rep. 833.

The priority of a lien is also a right of property, and the

Supreme Court could not, by rule, any more interfere with the priority of liens than it could create liens.

Baldwin v. *The Bradish*, 3 Woods, 586.

A lien is a right of property and not a mere matter of procedure.

The Lottawanna, 21 Wall. 579.

The Madrid, 40 Fed. Rep. 681.

Where a like rule had been established *in 1877* in Louisiana, Pardee, C. J., in deciding *in 1881* the case of *The De Smet*, and referring to the *Bradish Johnson* case, 3 Woods, 582, said:

"Since that decision—1877—the rule there laid down "has been the law in this circuit. The eminent admiralty "judges in this circuit, notably in Mississippi and this "State, have indorsed the decision, and followed it in de- "termining the rights of parties in many cases, and I am "now confronted with *stare decisis*. Upon this, Chancellor "Kent says (1 Kent, Comm., 475): 'If a decision has been "'made upon solemn argument and mature deliberation, "'the presumption is in favor of its correctness: and the "'community have a right to regard it as a just declara- "'tion or exposition of the law, and to regulate their ac- "'tions and contracts by it. It would, therefore, be ex- "'tremely inconvenient to the public if precedents were not "'duly regarded and implicitly followed. * * * * * "'If judicial decisions were to be lightly disregarded we "'should disturb and unsettle the great landmarks of "'property.'

"And upon *stare decisis* Judge Cooley says (see Const. "Lim. 51): * * * * * * 'It will, of course, sometimes "'happen that a court will find a former decision so un- "'founded in law, so unreasonable in its deductions, or so "'mischievous in its consequences, as to feel compelled to "'disregard it. Before doing so, however, it will be well "'to consider whether the point involved is such as to have "'become a rule of property, so that titles have been ac- "'quired in reliance upon it, and vested rights will be dis-

"'turbed by any change; for, in such a case, *it may be* "'*better the correction of the error be left to the Legislature*, "'*which can control its action so as to make it prospective only*, "'*and thus prevent unjust consequences.*'

"There can be no doubt that, since the Bradish Johnson "case, if not before that time, business men in this circuit "have had the right to consider the rule laid down in that "case as the law of this circuit, and no doubt many rights "have been acquired under such view of the law."

The De Smet, 10 Fed. Rep. 487–488.

If such words are applicable to a case where the rule was only adopted for four years, are they not much more applicable to this case, where for more than twenty years business men in Chicago have considered the rule settled and have taken mortgages, relying on the settlement of the rule, to the amount of hundreds of thousands of dollars?

In this case, the petition of the appellees shows that, in April, 1891, they owned the vessel, and sold her for $3,500, $500 of which was paid in cash and the balance secured by the mortgage now in question (Abst. 13.) The action of the appellees shows their faith in the establishment of the rule in this circuit. The money now remaining is not sufficient to pay more than one-third of the amount due upon the mortgage, and if the claims of the appellants are preferred to the mortgage, then the appellees will get nothing.

I have been unable to ascertain the amount of indebtedness secured by mortgages on vessels recorded in this circuit. But in view of the multitude of vessels, both small and great, enrolled at Chicago, and in view of the fact that a vessel is seldom sold for cash except at a marshal's sale, it is beyond question that a decision in this case, postponing the mortgage to the home supplies would have the effect of an *ex post facto* law, of incalculable injury to, what may be justly termed, the vested rights of every holder of a vessel mortgage on a vessel having its home port in Chicago.

When a court has once laid down a principle of law as applicable to a certain state of facts, for the sake of the sta-

bility and certainty of the law, it will apply that principle to all future cases where the facts are substantially the same.

Moore v. *Albany*, 98 N. Y. 410.

Stability and certainty in the law are of the first importance. *The certainty of a rule is often of more importance than the reason of it.*

N. W. Forwarding Co. v. *Mahaffey*, 36 Kan. 157.
White v. *Denman*, 1 Ohio St. 115.

In deciding the case of *The Madrid*, Justice Lamar says, 40 Fed. Rep. 679: "The rule of *stare decisis* means, in "general, that when a point has been once settled by judi- "cial decision, it forms a precedent for the guidance of "courts in similar cases. It expresses 'the principle upon "which rests the authority of judicial decisions as prece- "dents in subsequent litigations.' Abb., Law Dict., 497; "*Gee's Adm'r* v. *Williamson*, 27 Amer. Dec. 631, note. This "rule should, in the main, be strictly adhered to. An ad- "herence to it is necessary to preserve the certainty, the "stability and the symmetry of our jurisprudence."

And the Supreme Court in *The Lottawanna*, 21 Wallace, on page 571, say: "A solemn judgment relied on so long by "the commercial community as a rule of property and the "law of the land ought not to be overruled, except for very "*cogent reasons*."

In conclusion, I submit that there is no cogent reason why the rule in the State of Illinois should now be changed. There is no injustice in it; and upon the record now before the court and upon the statute of Illinois, I submit that the claim under the mortgage should be preferred to that for supplies. A reversal of the rule held in Illinois for twenty-two years, would not only have the effect of an *ex post facto law*, injuring many innocent persons who are not before the court, but it would also greatly lessen the confidence of the community in the stability of the law as administered in

the seventh circuit, and would encourage on other questions of law, endless appeals. For if a decision upon a point of law, adopted and maintained for twenty-two years, is not established, then it can never be established, by any length of time.

Respectfully submitted,

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Proctor for Appellees.